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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 13, 2001

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of AT&T Corp. and Sprint Communications Company for Declaratory Ruling, CCB/CPD 01-02

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, enclosed please find four copies of a June 13, 2001 letter and attachment from David A. Konuch, Kelley, Drye & Warren, to Dorothy T. Attwood, Chief, Common Carrier Bureau, Federal Communications Commission for inclusion in the record of the above-captioned dockets.

Please contact me at (202) 955-9871 if you have any questions regarding this filing.

Sincerely,

David A. Konuch

Enclosures

cc: Dorothy Attwood
Alex Starr
A.J. DeLaurentis
James Bendernagel (Counsel for AT&T)
Frank Krogh (Counsel for Sprint)

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June 13, 2001

EX PARTE
VIA COURIER AND FACSIMILE

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of AT&T Corp. and Sprint Communications Company for Declaratory Ruling, CCB/CPD 01-02

Dear Dorothy:

Enclosed is a copy of the Plaintiffs' brief that we filed last week in *Advamtel et al v. AT&T Corp.*, CA No. 00-643-A, currently pending before Judge Ellis in the United States District Court for the Eastern District of Virginia. The brief responds to Judge Ellis's request that the parties analyze the effect of recent Federal Communications Commission actions on the resolution of the federal district court lawsuits in which we are seeking to compel payment of access charges withheld by AT&T and Sprint and owed to 14 Competitive Local Exchange Carriers ("CLECs").

Sincerely,

David A. Konuch
Counsel for Plaintiffs

cc: Alex Starr
A.J. DeLaurentis
Jeffrey Dygert
Glenn Reynolds
James Bendernagel (AT&T)
Frank Krogh (Sprint)

DC01/KONUD/151955.1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

RECEIVED
JUN 18 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ADVAMTEL, LLC *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 00-643-A
AT&T CORP.,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO THE COURT'S JUNE 4 ORDER

On June 4, 2001, the Court entered an Order directing the parties to file a memorandum setting forth the proper resolution of the case at bar in light of the FCC's May 30, 2001 Memorandum Opinion and Order[1] (the "*BTI Rate Case Order*"), which addressed the reasonableness, on a retrospective basis, of the access rates charged by Plaintiff Business Telecom, Inc. ("BTI"). The *BTI Rate Case Order* did not address the issues related to constructive ordering that this Court referred to the FCC. On April 27, 2001, the Commission released its *CLEC Access Charge Order*,[2] which *did* consider explicitly issues relating to constructive ordering, *albeit* on a prospective basis. The *CLEC Access Charge Order* is scheduled to take effect on June 20, 2001, unless stayed by the FCC or by a court. The *CLEC*

1 *AT&T v. Business Telecom, Inc.*, EB-01-MD-001, *consolidated with Sprint Corp. LP v. Business Telecom, Inc.*, EB-01-002, FCC 01-185 (rel. May 30, 2001) ("*BTI Rate Case Order*").

2 *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (April 27, 2001) ("*CLEC Access Charge Order*"), attached hereto at Exhibit 1.

Access Charge Order outlines a framework for how the FCC believes these lawsuits should be resolved.

Approximately one month remains before the Court's six-month stay of this action will be lifted, but it is unclear if, prior to the July 19 deadline set by this Court, the FCC will issue an order explicitly addressing constructive ordering under tariffs effective prior to the date the *CLEC Access Charge Order* takes effect. As Plaintiffs have previously advised the Court, FCC representatives indicated in informal meetings and discussions with counsel that the FCC intended to address these questions. Since the issuance of the *CLEC Access Charge Order* on April 27, 2001, however, it is unclear whether the FCC believes that order is adequate to address the Court's referral, or whether it will issue another order to do so. Indeed, in recent informal discussions between Plaintiff's counsel and FCC personnel, the FCC personnel have pointedly refused to commit to the issuance of a further order.

Plaintiffs urge the Court to take the case back immediately, and to schedule trial as expeditiously as possible. The *CLEC Access Charge Order* provides the Court with more than adequate guidance as to the proper interpretation of the Communications Act,[3] and fully supports a judgment in Plaintiff's favor. Moreover, continued delay in this case – even the additional five weeks between now and the July 19 deadline – causes irreparable harm to Plaintiffs. When this Court initially stayed the case for six months pending referral to the FCC, Plaintiffs argued that such delay would prove disastrous to Plaintiffs. This statement was accurate to a tragic degree: in the five months since this case was stayed, two of the Plaintiffs – Advamtel and WinStar – have declared bankruptcy. The millions of dollars in lawfully tariffed

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[3] Plaintiffs and Defendants will be meeting with the FCC on June 11, 2001 to discuss issues relating to the FCC complaints pending against BTI and the other Plaintiffs, at which time the FCC may provide additional information concerning the FCC's intentions.

access charges that AT&T has withheld from these carriers for more than two years contributed materially to these developments. Because the immediate resumption of this case would not prejudice any party, and continued delay would be highly prejudicial to Plaintiffs, the case should be reactivated without delay.[4]

As discussed herein, the FCC Orders already released provide ample guidance for the Court on the issues referred in the Court's Stay Order. More specifically, the *CLEC Access Charge Order* stands for two propositions: first, that existing law "require[s] IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable," *CLEC Access Charge Order* at ¶ 28; and second, that IXCs may ***never*** terminate or decline access services ordered or constructively ordered by CLECs whose rates are equal to or below the benchmark rates established by the FCC under 47 U.S.C. § 201(a). As such, the *CLEC Access Charge Order* strips AT&T and Sprint of any defense against Plaintiffs' claim of constructive ordering, and compels judgment for Plaintiffs.

BACKGROUND

I. THIS COURT'S ORDERS

On July 17 and July 21, 2000, the Court entered Orders referring Sprint and AT&T's rate reasonableness claims to the FCC under the doctrine of primary jurisdiction. *See Advamtel, LLC v. Sprint Communications Co.*, 105 F. Supp. 2d 476 (E.D. Va. 2000); *Advamtel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507 (E.D. Va. 2000).

---

[4] If the Court seeks certainty as to the FCC's intention to issue an additional order or not, Plaintiffs are prepared to work cooperatively with Defendants to request that the FCC clarify its intention in writing to this Court, in order to avoid pointless delay in the completion of this case.

On January 5, 2001, the Court ordered a stay of the instant case pending referral to the FCC, under the primary jurisdiction doctrine, of two specific constructive ordering questions:

> (i) whether any statutory or regulatory constraints prevent Sprint [or AT&T], as an IXC, from terminating or declining services ordered or constructively ordered, and if not,
>
> (ii) what steps IXCs must take either to avoid ordering or to cancel service after it has been ordered or constructively ordered.

Advamtel, LLC v. Sprint Communications Co., L.P., 125 F. Supp. 2d 800, 807 (E.D. Va. 2001).

II. THE FCC'S *CLEC ACCESS CHARGE ORDER*

On April 27, 2001, the FCC issued the *CLEC Access Charge Order*, which set a "bright-line" benchmark, or "safe harbor" rate, for determining presumptively reasonable CLEC access charges (initially 2.5 cents per minute or the rate charged by the competing ILEC, whichever is higher). *See CLEC Access Charge Order* at ¶¶ 41-46. The FCC set a higher rate for CLECs serving rural areas.[5] The *CLEC Access Charge Order* established that, on a going-forward basis, "CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff." *Id.* ¶ 3. For CLECs with tariff rates above the FCC benchmark, unless specifically negotiated higher with the IXC, "the CLEC must charge the IXC the appropriate benchmark rate." *Id.*

The *CLEC Access Charge Order* further made clear that 47 U.S.C. § 201(a) "obligates IXCs to serve the end users of a CLEC that is charging rates at or below the

---

[5] *See id.* at ¶ 73, 80. The FCC did not set a specific numeric benchmark, but rather set this rate roughly equal to the highest rate band tariffed by National Exchange Carrier Association (NECA). *See id.* at 80. By way of comparison, the retroactive rates set by the FCC in the *BTI Rate Case Order* were based on the *lowest* rate band for NECA carriers. *BTI Rate Case Order* at ¶ 57. The average rate for all NECA carriers is approximately 3.5 cents per minute.

benchmark." *Id.* ¶ 89. In other words, it is unlawful for AT&T and Sprint to block calls to or from CLECs. The FCC made this finding because:

> an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

Id. ¶ 5. When a "customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a)." *Id.* ¶ 94. In short, "since the benchmark rate is conclusively presumed reasonable, an IXC cannot refuse to provide service to an end user served by the CLEC without violating section 201." *Id.* ¶ 97.

In the *CLEC Access Charge Order*, the FCC criticized the IXCs' willful flouting of CLEC tariff rates for access service in an improper attempt to coerce CLECs to lower their access service rates – the very conduct by AT&T and Sprint giving rise to the instant lawsuit:

> [T]he major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. ***We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system.***

Id. ¶ 23 (footnotes omitted) (emphasis added). Similarly, the *CLEC Access Charge Order* criticized the IXCs' threats to stop delivering traffic to, or accept traffic from, certain CLECs they may unilaterally view as "high-priced":

> AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic. In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues. These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion. . . . ***If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. . . . [This] would represent a serious problem, and, in certain circumstances, it could be life-threatening.***

Id. ¶ 24 (footnotes omitted) (emphasis added). Finally, the *CLEC Access Charge Order* made it clear that the conduct of AT&T and Sprint was wholly improper and that no further impediment exists to Plaintiffs' straightforward collections actions against AT&T and Sprint pursuant to their filed tariffs:

> CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate.

Id. ¶ 60.

III. THE FCC'S *BTI RATE CASE ORDER*

The FCC issued the *BTI Rate Case Order* on May 30, 2001, and expressly addressed the necessarily backward-looking access service charge rate reasonableness claims referred by the Court in July 2001. *See AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, No. EB-01-MD-001, FCC 01-185, ¶¶ 6-7 (rel. May 30, 2001):

> These complaint proceedings arise from primary jurisdiction referral orders in . . . the *Advamtel Litigation*. . . . Specifically, the court referred Complainants' claims that BTI and other CLECs charged unreasonably high access rates, in violation of section 201(b) of the Act.

The *BTI Rate Case Order* defined "a just and reasonable rate" on which to base damage calculations for past access service charges received by AT&T and Sprint. *Id.* ¶ 1. The retrospective *BTI Rate Case Order* expressly references and adopts the approach of the prospective *CLEC Access Charge Order*:

> We find substantial guidance in the *CLEC Access Charge Order*'s determination that, for a year after its issuance, a rate of up to 2.5 cents per minute will be presumptively reasonable for CLEC access. Nothing in this record indicates that the considerations bearing on rate reasonableness during the retrospective period at issue here were markedly different from the circumstances the Commission considered in setting prospective tariff benchmarks.

Id. ¶ 55. Nonetheless, because access charges tariffed by most local carriers – CLEC as well as ILEC – were higher in the past than they are currently, the FCC concluded that it was reasonable for BTI to charge considerably higher rates in the past than the 2.5 cent rate prescribed prospectively in the *CLEC Access Charge Order*:

> [W]e find that the just and reasonable rates for both originating and terminating access services during the relevant time period are as follows:
>
> - July 1, 1998 through June 30, 1999 — 3.8 cents per minute
> - July 1, 1999 through June 30, 2000 — 3.0 cents per minute
> - July 1, 2000 through [May 30, 2001] — 2.7 cents per minute

Id. ¶ 58.

DISCUSSION

The FCC's *CLEC Access Charge Order* provides the Court with all the guidance it requires on the issues referred in its Stay Order. The *CLEC Access Charge Order* has, in fact, substantively answered the first question referred in the Court's Stay Order in the affirmative: Indeed, "***statutory or regulatory constraints [do] prevent . . . an IXC[] from terminating or***

declining services ordered or constructively ordered . . . ." *Advamtel*, 125 F. Supp. 2d at 807 (emphasis added).[6]

The FCC has conclusively determined, in its *CLEC Access Charge Order*, that IXCs "***may not refuse***" to provide service to a CLEC end user customer who "attempts to place a call either from or to a local access line . . . served by a CLEC with presumptively reasonable rates" and that "CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable." *CLEC Access Charge Order*, ¶¶ 94, 3 (emphasis added). The FCC has also definitively ruled that the Communications Act "obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark" and that "an IXC's refusal to serve the customers of a CLEC . . . constitutes a violation" *Id.* ¶¶ 89, 5. Finally, the FCC has given the Court the benefit of its specialized agency expertise on the ultimate issues in this lawsuit. In the FCC's view: (1) "IXCs appear routinely to be flouting their obligations under the tariff"; and (2) "an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff . . . . *Id.* ¶¶ 23, 60.

These findings are dispositive of the issues pending before the Court. As the citations from the *CLEC Access Charge Order* above make clear, it is a violation of Section 201 of the Communications Act for IXCs to block CLEC traffic that is priced at presumptively lawful rates. As Plaintiffs have demonstrated previously, the Communications Act requires, and the FCC has found, that rates filed on a streamlined basis – as all CLEC rates are – "shall be deemed lawful" unless and until the FCC finds otherwise and uses its prescriptive authority to change the rates. 47 U.S.C. § 204(a)(3); *see also* Second Amended Complaint (July 28, 2000) at

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[6] In light of the FCC's affirmative answer to the first question, it is unnecessary to reach the second question, which the Court expressly conditioned on a negative response to the first question.

¶ 30 ("Under the Communications Act, the rates of 'non-dominant' carriers such as Plaintiffs are presumed reasonable when validly filed in Tariffs, as Plaintiffs' have been"). As the FCC recently confirmed, "[t]ariffs require IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable." *CLEC Access Charge Order* at ¶ 28.

These unequivocal statements of the law allow only one conclusion: because all of the Plaintiffs' tariffed rates were deemed lawful at the time they were filed, AT&T and Sprint would have violated Section 201 of the Communications Act if they had refused to provide service to any of the Plaintiffs' customers by blocking traffic. If the FCC subsequently decides that the rates were excessive, it may be able to change the rates going forward.[7] but this does not change the fact that AT&T and Sprint were prohibited at all times from terminating or declining services ordered or constructively ordered. This finding prevents AT&T and Sprint from contending that they did not constructively order service, and triggers their obligation to pay the lawfully tariffed rate under the filed rate doctrine.

AT&T's counsel recognized in open court that if the FCC made such a finding, this case was effectively over:

> ATTORNEY BENDERNAGEL: . . . Our basic position is we want [the FCC to clarify] the legal issue [of] whether . . . we have the right to say, 'We are not accepting your service,' or 'We are declining your service,' . . . . I mean, ***if [the FCC] come back and they say, 'AT&T, you don't have that right,' we are finished here. I mean, it's over to the 208 rate case, and there is nothing to decide here.***

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[7] In the *BTI Rate Case Order*, the FCC ordered retroactive adjustments to BTI's rates. Any reference to the *BTI Rate Case Order* should not be taken as an endorsement of the FCC's ruling in that case. Indeed, the FCC's Order is wrongly decided and is profoundly flawed as a matter of fact and law, and unlikely to withstand appellate review if challenged in court. *See BTI Rate Case Order* at p. 29 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

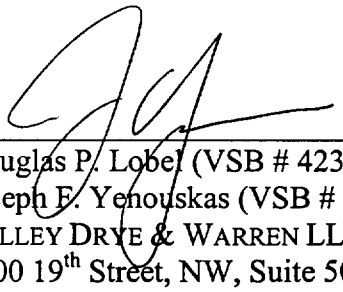
Transcript of Motions Hearing (Dec. 22, 2000) at 33, attached hereto as Exhibit 2 (emphasis added).

Indeed, the only issue left in the case is for the FCC to decide whether the rates tariffed by the Plaintiffs prior to the effective date of the *CLEC Access Charge Order* were reasonable. Such a finding can and should be made independently of a ruling by this Court. The Court should immediately award payment of the filed rates. The FCC can then determine whether any refunds to Defendants will be necessary. As the *BTI Rate Case Order* demonstrates, AT&T and Sprint are not helpless victims of the filed rate doctrine. If they believe CLEC access charges are excessive, relief is – and always has been – available to them through the formal complaint process before the FCC, pursuant to Section 208 of the Communications Act. This has been Plaintiff's position throughout the course of this lawsuit.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court immediately reactivate the instant case, and proceed to trial on the issue of damages.

Respectfully submitted,



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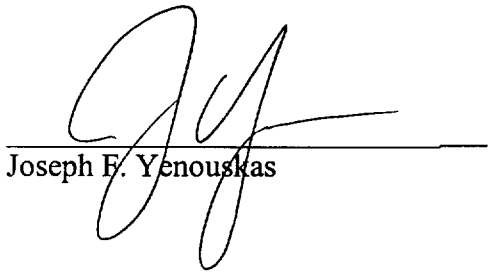
Dated: June 8, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have, this 8th day of June 2001, served Plaintiffs' Response to The Court's June 4 Order by causing copies of same to be delivered by United States mail, first-class postage prepaid, to (1) James Bendernagel, Esq., Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, counsel for AT&T Corp., and (2) J. William Boland, McGuire Woods, One James Center, 901 East Cary Street, Richmond, VA 23219



Joseph F. Yenouskas

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

SEVENTH REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: April 26, 2001 **Released:** April 27, 2001

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a separate statement at a later date.

I. INTRODUCTION

1. With this order, we continue our efforts to establish a "pro-competitive, deregulatory national policy framework" for the United States' telecommunications industry by addressing a number of interrelated issues concerning competitive local exchange carrier (CLEC) charges for interstate switched access services and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs.[1] Parties on both sides of these issues have

[1] In addressing these issues, the Commission has requested and received comments in several proceedings: *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order & Notice*); *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, CC Docket Nos. 96-262 and 97-146, Public (continued....)

requested Commission involvement in shaping a resolution to what the IXCs view as the CLECs' abuse of our tariff rules to impose excessive access charges and what the CLECs view as the IXCs' unreasonable demands for lower access charges and threats to reject CLEC access traffic.

2. By this order, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. Specifically, we limit the application of our tariff rules to CLEC access services[2] in order to prevent use of the regulatory process to impose excessive access charges on IXCs and their customers. Previously, certain CLECs have used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.

3. Our goal in this process is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. We accomplish this goal by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. During the pendency of negotiations, or if the parties cannot agree, the CLEC must charge the IXC the appropriate benchmark rate. We also adopt a rural exemption to our benchmark scheme, recognizing that a higher level of access charges is justified for certain CLECs serving truly rural areas.

4. To avoid too great a disruption for competitive carriers, we implement the benchmark in a way that will cause CLEC rates to decrease over time until they reach the rate charged by the incumbent LEC. This mechanism will mimic the operation of the marketplace as competitive LECs will no longer be operating in the access market with tariffed rates well above the prevailing market price. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail

(Continued from previous page)
Notice, 15 FCC Rcd 10181 (Comm. Carr. Bur. 2000) (*Mandatory Detariffing Public Notice*); *Common Carrier Bureau Seeks Comment on the Request for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision*, CC Docket No. 96-262, Public Notice, DA-00-1067, 2000 WL 217601 (Comm. Carr. Bur., rel. May 15, 2000) (*Emergency Petition Public Notice*); *Common Carrier Bureau Seeks Comment on Issues Relating to CLEC Access Charge Reform*, CC Docket No. 96-262, Public Notice, 15 FCC Rcd 24102 (2000) (*Safe Harbor Public Notice*). Below, we refer to a comment or reply comment to the *Pricing Flexibility Order & Notice* as Comment or Reply Comment, respectively. A comment or reply comment to the *Mandatory Detariffing Public Notice* is identified as Detariffing Comment or Detariffing Reply Comment, respectively. We refer to a comment or reply comment to the *Emergency Petition Public Notice* as Emerg. Pet. Comment or Emerg. Pet. Reply Comment, respectively. A comment or reply comment to the *Safe Harbor Public Notice* is identified as Safe Harbor Comment or Safe Harbor Reply Comment, respectively. Appendix A includes a list of parties filing comments in each of these proceedings.

[2] In this order, we use the term "access services" to refer only to interstate switched access services, unless we specifically indicate to the contrary.

themselves of the convenience of a tariffed service offering. In addition, this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate. Naturally, the CLECs also retain the option of recovering from their end users any additional costs that they may experience.

5. The regulatory forbearance that we undertake today continues our move to market-based solutions by encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit. We also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

6. Our order today is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market currently taking root. We intend to allow CLECs a period of flexibility during which they can conform their business models to the market paradigm that we adopt herein. In addition, these rules should continue to ensure the ubiquity of a fully interconnected telecommunications network that consumers have come to expect. Finally, by ensuring that CLECs do not shift an unjust portion of their costs to interexchange carriers, our actions should help continue the downward trend in long-distance rates for end users.

7. We stress, however, that the mechanism set out below is a transitional one; it is not designed as a permanent solution to the issues surrounding CLEC access charges. Rather, we view the mechanism we adopt today as a means of moving the marketplace for access services closer to a competitive model. Because our tariff benchmark is tied to the incumbent LEC rate, we will re-examine these rates at the close of the period specified in the *CALLS Order*.[3] Through a separate notice of proposed rulemaking that we issue today, we also evaluate the access charge scheme as part of a broader review of inter-carrier compensation.[4]

II. BACKGROUND

8. Competitive entrants into the exchange access market have historically been subject to our tariff rules, but have been largely free of the other regulations applicable to incumbent LECs.[5] Incumbent LECs, on the other hand, are closely regulated in their ratemaking to ensure that their interstate access charges are just and reasonable.[6] In recent years, the Commission has repeatedly examined access rates, attempting to make them more economically

[3] *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Dkt. Nos. 01-92, 99-68, 96-98, FCC 01-132 (rel. April 27, 2001) (*Intercarrier Compensation NPRM*).

[5] *See Tariff Filing Requirements for Non-Dominant Common Carriers*, CC Dkt. No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds, Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[6] *See infra* note 93.

rational. Some of the overarching goals the Commission has pursued in this effort include the promotion of competition, aligning access rate structures more closely with the manner in which costs are incurred, the removal of subsidies from access rates and deregulation as competition develops.[7] The result of the Commission's efforts has been a steady reduction in access charges and in long distance rates which, in turn, has dramatically increased consumer usage of long distance service.

9. Although the access charge debate previously has focused primarily on dominant carriers, as CLEC market share has increased, a correspondingly greater interest in the rates of competitive carriers has developed. As a result, CLEC access charges recently have been the subject of several Commission proceedings and the filings of several parties.

10. The *Access Reform NPRM*: In the *Access Reform NPRM*, the Commission sought comment on whether CLECs can exercise market power with regard to terminating access services and whether and how the Commission should regulate those services.[8] The Commission noted the differences between the originating and terminating access markets. For example, with *originating* access, the Commission recognized that the calling party chooses the service provider and decides whether to place a call, and it has the ultimate obligation to pay for the call.[9] The calling party also is the customer of the IXC that purchases the originating access service.[10] The Commission tentatively concluded, that, as long as IXCs could influence the calling party's choice of the access provider, a LEC's ability to charge excessive originating access rates would be limited, because IXCs likely would create incentives for their end users to move to competing, less expensive access providers.[11] On the other hand, the Commission recognized that, with *terminating* access, the called party chooses the access service provider, while the decision to make the call and the ultimate responsibility to pay for the call reside with the calling party, and the calling party's IXC must pay for the terminating access service.[12] Because of this disjunction implicit in terminating access, neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider.[13] The Commission noted that this may give CLECs the incentive to charge excessive rates for terminating access service.[14]

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[7] *See Access Charge Reform*, CC Docket 96-262, First Report and Order, 12 FCC Rcd 15982 (*Access Charge Reform Order*), *aff'd sub. nom. Southwest Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221; *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

[8] *Access Charge Reform*, CC Docket 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21476 (1996) (*Access Reform NPRM).*

[9] *Id.* at 21472.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 21476.

[13] *Id.*

[14] *Id.*

11. The Commission also noted an additional complication for an IXC faced with high CLEC access rates. Not only does the calling party not choose the terminating LEC, but section 254(g) requires IXCs to spread the cost of terminating access rates among all of its end users.[15] Accordingly, the Commission tentatively concluded in the *Access Reform NPRM* that terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer, even if competitors have entered the market.[16] The Commission also opined, however, that excessive terminating access charges might encourage IXCs to enter the access market themselves.[17]

12. The *Hyperion Order*: In the *Hyperion Order*, the Commission established permissive detariffing for non-incumbent LEC providers of interstate exchange access services.[18] The Commission also sought comment on mandatory detariffing for CLEC interstate access services.[19] The Commission did not take further action, however, because the District of Columbia Circuit Court of Appeals stayed the Commission's mandatory detariffing order for IXCs. Later, after the D.C. Circuit upheld the Commission's IXC mandatory detariffing order,[20] the Commission issued a public notice to refresh the record on the issue of mandatory detariffing for CLEC access services.[21]

13. The *Access Reform Order:* In the *Access Reform Order*, the Commission declined to adopt regulations governing CLEC terminating access charges, or to address the issue of CLEC originating access charges.[22] Based on the available record, the Commission decided to continue to refrain from regulating the rates charged by non-incumbent LECs for terminating access service.[23] Although an IXC must use the CLEC serving an end user to terminate a call,

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[15] *See* 47 U.S.C. § 254(g). *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996) (requiring IXCs to integrate and average the rates they charge for service).

[16] *Access Reform NPRM,* 11 FCC Rcd at 21476.

[17] *See id. at* 21477. The Commission also sought comment on whether it should treat CLEC originating "open end" minutes, such as originating access for 800 service, as terminating minutes for access charge purposes. *Id.* "The term open end of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends.)" 47 C.F.R. § 69.105(b)(1)(ii). The Commission noted that, in some cases, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services. *Access Reform NPRM,* 11 FCC Rcd at 21477.

[18] *See Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997) (*Hyperion Order*) (granting petitions seeking permissive detariffing for provision of interstate exchange access services by providers other than the incumbent LEC).

[19] *Hyperion Order*, 12 FCC Rcd at 8613.

[20] *MCI WorldCom, Inc. v. Federal Communications Commission*, 209 F.3d 760 (D.C. Cir. 2000).

[21] *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181.

[22] *Access Charge Reform Order*, 12 FCC Rcd at 15982.

[23] *Id.* at 16140.

the Commission found that the record did not indicate that CLECs previously had charged excessive terminating access rates or that CLECs distinguished between originating and terminating access in their service offerings.[24] As a result, the Commission concluded that CLECs did not appear to have structured their service offerings in ways designed to exercise market power over terminating access.

14. The Commission further observed that, as CLECs attempted to expand their market presence, the rates of incumbent LECs or other potential competitors should constrain the CLECs' terminating access rates.[25] The Commission found that access customers likely would take competitive steps to avoid paying unreasonable terminating access charges.[26] Thus, it explained that a call recipient might switch to another local carrier in response to incentives offered by an IXC.[27]

15. Although the Commission declined to adopt regulations governing the provision of CLEC terminating access, it noted that it could address the reasonableness of CLEC terminating access rates in individual instances through the section 208 process for the adjudication of complaints.[28] Moreover, the Commission stated that it would be sensitive to indications that the terminating access rates of CLECs were unreasonable, and it committed to revisit the issue of CLEC access rates if there were sufficient indications that CLECs were imposing unreasonable terminating access charges.[29]

16. Complaint Proceedings: The Commission addressed issues related to competitive carriers' access services in three different section 208 complaint proceedings.[30] On July 16, 1999, in *MGC v. AT&T*, the Commission ruled that AT&T was liable to MGC for originating access charges at MGC's tariffed rate because AT&T had failed to take the necessary steps to terminate its access service arrangement with MGC.[31] On June 9, 2000, in *Sprint v. MGC*, the Commission rejected the argument that a CLEC's access rates are *per se* unjust and unreasonable – and therefore violative of section 201(b) – because they exceed the rates charged by incumbent LECs in the CLEC's region.[32] Finally, on March 13, 2001, in *Total Tel. v. AT&T*,[33] the Commission ruled that a competitive access provider's rates for terminating access were the

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[24] *Id.*

[25] *Id.*

[26] *Id.* at 16140-41.

[27] *Id.* at 16141.

[28] *Id. See generally* 47 C.F.R. §§ 1.720-1.735 (Commission rules governing formal complaints); 47 U.S.C. § 208.

[29] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[30] The Commission currently has before it several additional complaint proceedings. *See infra* note 56.

[31] *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

[32] *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000).

[33] *Total Tel. v. AT&T*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001) (*Total Tel. Order*).

product of a sham arrangement to inflate its rates and to pass on a portion of the inflated rate to the carrier's single end user. Accordingly, we ruled in that proceeding that AT&T did not violate sections 201(a), 202(a), 214(a) or 251(a) of the Act[34] when it declined the access provider's terminating access service and blocked traffic bound for the access provider's single end-user customer.

17. *Pricing Flexibility Order and Further Notice of Proposed Rulemaking*: In August of 1999, the Commission issued its *Pricing Flexibility Order and Notice*, which, *inter alia*, denied AT&T's petition for a declaratory ruling that IXCs may refuse to purchase CLECs' tariffed switched access service.[35] The Commission noted that, in the *Access Charge Reform Order*, it may have overestimated the ability of the marketplace to constrain CLEC access rates.[36] In particular, the Commission noted that AT&T's Petition for Declaratory Ruling, the comments provided in support of it, and the decision in *MGC v. AT&T* suggested the need to revisit the issue of CLEC access rates.[37] Accordingly, the Commission initiated the current rulemaking proceeding to examine CLEC originating and terminating access rates, and it sought comment on regulatory and market-based solutions to ensure that CLEC rates for interstate access are just and reasonable.[38]

18. The Commission again invited comment on, *inter alia*, whether CLECs possess market power over IXCs that need to terminate long distance calls, whether mandatory detariffing of CLEC interstate access services would provide a market-based deterrent to excessive terminating access charges, and whether rates could be constrained by establishing a benchmark for CLEC access charges that would be presumed reasonable.[39] We acknowledged that CLEC access rates may, in fact, be higher due to the CLECs' high start-up costs for building new networks, their small geographical service areas, and the limited number of subscribers over which CLECs can distribute costs.[40] We also recognized, however, that IXCs currently spread their access costs among all their end users and that requiring IXCs to bear a CLEC's higher start-up costs may impose unfair burdens on IXC customers that pay rates reflecting these CLEC costs even though many of the IXC customers may not subscribe to those CLECs.[41]

19. The *CALLS Order*: During the course of the debate over CLEC access charges, the Commission adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service

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[34] 47 U.S.C. §§ 201(a), 202(a), 214(a), 251(a).

[35] *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221.

[36] *Id.* at 14339.

[37] *Id.* at 14340.

[38] *Id.* at 14340.

[39] *Id.* at 14340-45.

[40] *Id.* at 14343.

[41] *Id.*

(CALLS).[42] The *CALLS Order* resolved major outstanding issues concerning access charges of price-cap ILECs by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support.[43] The adoption of the *CALLS Order* moved the Commission a step closer to its access charge reform goals for dominant carriers. The *CALLS Order* is interim in nature, covering a five-year period[44]; its reforms became effective on July 1, 2000.

20. Emergency Petitions: In February and May 2000, we received two declaratory ruling petitions asking that we prohibit AT&T from withdrawing its interexchange services from customers of CLECs pending the outcome of the rulemaking proceedings relating to CLEC access charges. We subsequently sought comment on these petitions.[45]

III. CLEC SWITCHED ACCESS SERVICES

A. Overview

21. Congress and the Commission have adopted policies designed to encourage competition for local exchange and exchange access services. Although competition for access services existed to some extent prior to 1996, the 1996 Act created new opportunities for competing access providers by opening the local exchange market to competition.[46] As a result, competition for local exchange and exchange access service is taking root: between 1996 and 1999, the number of competitive LECs increased from 94 to 349.[47] During their development, CLECs have been largely unregulated in the manner that they set their access rates. We note, however, that section 201 gives us the authority to ensure that CLEC rates are just and reasonable.[48]

22. Our review of the record reveals that CLEC access rates vary quite dramatically and, on the average, are well above the rates that ILECs charge for similar service. Sprint, WorldCom and AT&T have submitted information on the CLEC access charges for which they have been billed. These data sets reveal a strikingly broad range of rates. Some competitive LECs charge at or even below 1 cent per minute; indeed, it appears that many CLECs are

[42] *CALLS Order*, 15 FCC Rcd 12962.

[43] *Id.* at 12974-76.

[44] *Id.* at 12977.

[45] *Emergency Petition Public Notice*, DA-00-1067, 2000 WL 217601.

[46] *See, e.g.*, 47 U.S.C. § 251.

[47] Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 9.6 (Dec. 2000).

[48] *See generally Access Reform NPRM*, 11 FCC Rcd at 21474-76; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1, ¶¶ 88-96 (1980).

charging approximately the ILEC access rate.[49] On the other hand, certain CLECs are charging above 9 cents per minute and the weighted average of CLEC access rates falls above 4 cents per minute.[50] AT&T estimates that approximately 100 CLECs have tariffed rates above 2.5 cents per minute and 60 have per-minute rates above 5.0 cents.[51] AT&T further asserts that, in 2000, it was billed for $106 million in CLEC access charges, representing a premium of $92 million over what the competing ILECs would have billed for the same number of minutes of service.[52] While we have questions about AT&T's calculation of this premium,[53] there can be little question that CLECs are adding dramatically to the overall level of access charges that IXCs are paying. We are concerned that the higher CLEC rates may shift an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance market in general.

23. Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate.[54] AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable.[55] We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts.[56] And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute. This uncertainty, in turn, poses a significant threat to the

[49] *See* AT&T Safe Harbor Comments at 7.

[50] *See infra* paragraphs 48-49

[51] *See* AT&T Safe Harbor Comments at 7.

[52] AT&T Safe Harbor Comments, Appendix A.

[53] For example, it is unclear whether AT&T's calculation of the competing ILEC rate includes certain flat-rated elements.

[54] Buckeye Comments at 3; Sprint Reply Comments at 28-30; Allegiance Comments at 18-19; MGC Comments at 7. In performing these calculations, Sprint appears typically to have used the rate of the competing ILEC as the just and reasonable rate.

[55] *See, e.g., Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 682 (E.D. Va. 2000).

[56] *See Advamtel, LLC v. AT&T Corp.*, CIV. A. No. 00-643-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Advamtel, LLC v. Sprint Communications.*, CIV. A. No. 00-1074-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Total Telecomm. Servs., Inc. v. AT&T Corp.*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001); *Time Warner Telecom, Inc. v. Sprint Communications Company, L.P.*, File No. EB-00-MD-004 (complaint filed Mar. 16, 2000); *U.S. TelePacific Corp. v. AT&T Corp.*, File No. EB-00-MD-010 (complaint filed June 16, 2000); *AT&T Corp. v. Business Telecom, Inc.*, File No. EB-01-MD-001 (complaint filed Jan. 16, 2001); *Sprint Communications Company, L.P. v. Business Telecom, Inc.*, File No. EB-01-MD-002 (complaint filed Jan. 16, 2001).

continued development of local-service competition, and it may dampen CLEC innovation and the development of new product offerings.[57]

24. Additionally, IXCs have threatened to stop delivering traffic to, or accepting it from, certain CLECs that they view as over-priced. Thus, AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic.[58] In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues.[59] These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion.[60] Once one or more IXCs refuse to do business with a CLEC, it will become impossible for that CLEC's end users to reach, or receive calls from, some parties outside of the local calling area. If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. We are particularly concerned with preventing such a degradation of the country's telecommunications network. It is not difficult to foresee instances in which the failure of a call to go through would represent a serious problem, and, in certain circumstances, it could be life-threatening. Accordingly, the public interest demands a resolution to this set of problems.

25. Given the state of the marketplace for CLEC access services, and our judgment that more serious developments could loom in the future if we do not take action, we are persuaded of the need to revisit these issues in a global fashion. Previously, the Commission refrained from involving itself in a general examination of the reasonableness of CLEC access rates, ruling instead that any unreasonable rates could be addressed through the section 208 complaint process. However, this regime has often failed to keep CLEC access rates within a zone of reasonableness. It now appears that the best means of proceeding is to restructure and partially deregulate the environment in which CLECs provide access service, providing a bright-line rule that will facilitate effective enforcement. Additionally, the record indicates that numerous questions about the reasonableness of CLEC rates exist in the industry. Several parties have already filed with the Commission informal complaints raising this issue in order to preserve their claims from lapse.[61] We are concerned that a flood of unreasonable-rate complaints could overtax the Commission's resources to deal with such proceedings in a manner that is timely and efficient yet gives each complaint the attention it deserves.

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[57] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief, CC Dkt. No. 96-262, at 3 (filed May 5, 2000).

[58] *See* RICA Request for Emergency Relief, CC Dkt. No. 96-262, at 2-3 (filed Feb. 18, 2000); Minnesota CLEC Consortium Request for Emergency Relief at 2-3; Buckeye Emerg. Pet. Comments at 1-3; MTA Emerg. Pet. Comments at 3-4.

[59] *See Advamtel*, 118 F. Supp. 2d at, 682; RICA Comments at 4-7, 12-13. *Cf.* Sprint Comments at 24-25; CCG Comments at 5.

[60] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief at 3.

[61] *See, e.g., AT&T v. CFW Communications Company*, File No. EB-01-MDIC-0003 (informal complaint filed Jan. 16, 2001); *AT&T v. Commonwealth Telephone*, File No. EB-01-MDIC-0004 (informal complaint filed Jan. 16, 2001); *Sprint v. e.spire Communications, Inc.*, File No. EB-01-MDIC-0015 (informal complaint filed Jan 12, 2001).

B. The Structure of the Access Service Market

26. The commenters present two dramatically different views of the problem of CLEC access charges. IXC purchasers of CLEC access services contend that CLECs have tariffed switched access rates at unjust and unreasonable levels.[62] They assert that it is an anomaly for a "competitive" provider to enter a market by charging well in excess of the rate charged by the market's incumbent and that such entry could not be maintained in a competitive market.[63] The IXCs argue that high access charges allow CLECs unfairly to shift their operational expenses and their network build-out expenses to IXCs and, through them, to long distance ratepayers generally.[64] Moreover, IXC commenters complain that these unreasonable rates are unilaterally imposed through tariffs, rather than through negotiation with a willing purchaser.[65] Furthermore, the IXCs complain that many CLECs take the position that IXCs may not refuse CLEC access services.[66] Thus, the IXC commenters see themselves as unwilling consumers of the CLECs' access services.[67]

27. By contrast, CLECs assert that their rates are justified by their substantial network development costs and their significantly higher per-unit cost of providing service that arises from the smaller customer base over which they may spread their operational costs.[68] They argue that ILECs were for many years protected monopoly providers of local exchange and exchange access services; during that time, they funded the build-out of their networks through rates imposed on captive customers and through access rates that were dramatically higher than they are today.[69] Defending their filing of tariffs for access service, CLEC commenters assert that the

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[62] AT&T Comments at 28 (numerous CLECs tariff rates at "supracompetitive" levels); Sprint Comments at 14-15; Cable & Wireless Comments at 2. *But see* MCI WorldCom Comments at 18 ("there is no evidence in the record to demonstrate that unreasonably high CLEC access charges are ubiquitous or even widespread").

[63] *See, e.g.*, Sprint Comments at 19 (CLECs "cannot expect to enter a market, of their own free will, as competitors and yet attempt to recover their start-up costs from customers").

[64] Sprint Comments at 16 ("The level of charges some CLECs are seeking to collect could easily undermine the basis for current long distance rates.").

[65] *See, e.g.*, AT&T Comments at 28.

[66] *See* AT&T Reply Comments at 31 (noting CLEC "claims that IXCs are obligated to pay CLECs' exorbitant access charges simply by virtue of the fact that their networks receive traffic from, or terminate traffic to, the CLECs' end users"); AT&T Public Notice Comments at 6 (citing to *Advamtel* case).

[67] AT&T Reply Comments at 31 ("[I]t is not technically feasible without time-consuming and costly development ... to identify and then selectively block calling over their networks from or to end users served by CLECs.").

[68] *See, e.g.*, ALTS Comments at 3-4; CCG Comments at 9 ("As brand new entities, CLECs have substantially higher costs and serve a smaller customer base than their ILEC counterparts."); Allegiance Comments at 13, 20; McLeod Comments at 3; RICA Comments at 15-16.

[69] *See, e.g.*, Focal Comments at 17 ("Incumbent LECs ... benefit from their historical monopolies and decades of rate of return regulation, and thus already have ubiquitous telecommunications networks in place.").

section 208 complaint process provides IXCs an adequate remedy against unjust and unreasonable rates.[70]

28. The Act and our rules require IXCs to pay the published rate for tariffed CLEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable.[71] It appears that certain CLECs have availed themselves of this rule and have refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind IXCs receiving their access service to the rates therein.[72] CLEC use of this strategy raises questions about the extent to which CLECs truly are subject to competition in their provision of access service. The Commission has previously noted the unique difficulties presented by the case of terminating access, where the called party is the one that chooses the access provider, but it neither pays for terminating access service, nor does it pay for, or choose to place, the call.[73] It further complicates the case of terminating access that an IXC may have no prior relationship with a CLEC, but may incur access charges simply for delivering a call to the access provider's customer.[74] In these circumstances, providers of terminating access may be particularly insulated from the effects of competition in the market for access services. The party that actually chooses the terminating access provider does not also pay the provider's access charges and therefore has no incentive to select a provider with low rates.[75] Indeed, end users may have the incentive to choose a CLEC with the highest access rates because greater access revenues likely permit CLECs to offer lower rates to their end users.[76]

29. The record does not indicate that a significant number of CLECs charge markedly higher rates for terminating than they do for originating access. It thus appears that CLEC originating access service may also be subject to little competitive pressure, notwithstanding the fact that the IXCs typically have a relationship with the local exchange provider in order to be included on the LEC's list of presubscribed IXCs.

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[70] *See, e.g.*, Cox Comments at 3;

[71] *See Hyperion Order*, 12 FCC Rcd 8596, 8608-8611, ¶¶ 23-29 (1997). *Cf. Advamtel*, 118 F. Supp. 2d at 687 (concluding that parties are precluded from negotiating separate agreements that affect the rate for services once a tariff has been filed with the Commission).

[72] *See, e.g.* AT&T Safe Harbor Comments at 3; Allegiance Comments at 4 ("customers of a tariffed service are required to pay tariffed charges until they obtain a ruling in a Section 208 complaint proceeding that the tariffed charges are unlawful"); RCN Comments at 10-11.

[73] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338.

[74] Toll free calling and casual calling (dial around, credit card, etc.) may also result in an IXC paying access charges despite the fact that there is no pre-existing relationship between an IXC and the calling party's access provider.

[75] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338. *Cf.* AT&T Safe Harbor Comments at 2 ("recipient of a traditional long distance call does not pay for the cost of that call; hence, end users are indifferent to the terminating access rates of the CLEC they select as a service provider, and that carrier can raise terminating access rates without impairing demand for its local service").

[76] *See, e.g.*, Sprint Comments at 17 (suggesting that some CLECs may provide local service free of charge to customers that generate significant access traffic).

30. Sprint and AT&T persuasively characterize both the terminating and the originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user.[77] Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.

31. On further consideration, it appears that the CLECs' ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider's access charges. Rather, the access charges are paid by the caller's IXC, which has little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones. Second, the Commission has interpreted section 254(g) to require IXCs geographically to average their rates and thereby to spread the cost of both originating and terminating access over all their end users. Consequently, IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges.[78] Since the IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.

32. The Commission previously projected that, at least in the case of originating access service, IXCs would likely enter marketing alliances with LECs offering low-priced access service and would thereby be able to exert downward pressure on CLEC access rates.[79] The Commission even raised the prospect that IXCs would themselves choose to enter the local service market as a means of exerting downward pressure on terminating rates. However, neither of these eventualities has come to pass, at least not to an extent that has resulted in effective downward competitive pressure on CLEC access rates. We now acknowledge that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates.[80]

33. We are concerned that, in this environment, permitting CLECs to tariff any rate that they choose may allow some CLECs inappropriately to shift onto the long distance market in general a substantial portion of the CLECs' start-up and network build-out costs. Such cost shifting is inconsistent with the competitive market that we seek to encourage for access

[77] *See* Sprint Comments at 17-18; AT&T Safe Harbor Public Notice Comments at 2-3; NY PSC Comments at 2; Alaska Comments at 5; Wisconsin PSC Comments at 3-5; Sprint Reply Comments at 9-12.

[78] *See* AT&T Safe Harbor Comments at 2. *See also* 47 U.S.C. § 254(g).

[79] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[80] *See generally* J. Acton & S. Besen, *An Economic Analysis of CLEC Access Pricing*, Charles River Associates, Cambridge, MA, 1999; R. Crandall & L. Waverman, *Talk Is Cheap*, The Brookings Institution, Washington, DC 1995.

service.[81] Rather, it may promote economically inefficient entry into the local markets and may distort the long distance market. While we seek to promote competition among local-service providers, we also seek to eliminate from our rules opportunities for arbitrage and incentives for inefficient market entry.

34. We decline to conclude, in this order, that CLEC access rates, across the board, are unreasonable. Nevertheless, there is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates.[82] Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.

C. Tariff Benchmark Mechanism

35. We have previously sought comment on a variety of solutions to the problems connected with CLEC access charges, including mandatory detariffing of CLEC switched access services and setting a benchmark to constrain CLEC switched access charges.[83] A substantial majority of commenters, including CLECs, IXCs, and ILECs, strongly oppose the mandatory detariffing option.[84] They urge that it would cause both CLECs and IXCs to incur substantial and unnecessary negotiation costs simply to exchange traffic.[85] They further contend that these costs would create a significant barrier to entry for competitors seeking to enter the local market and would at least marginally drive up end-user rates for both local and long distance service.[86]

36. Apart from their opposition to mandatory detariffing, however, the two sides of the debate have been largely unable to agree about how CLECs should set rates for their switched access services. Certain IXCs assert that the Commission should immediately set CLEC tariffed rates at or near the rates of the ILEC operating in the CLEC's service territory.[87] On the other

[81] Parenthetically, we note that the drafters of the 1996 Act anticipated the high costs associated with facilities-based entry into local markets and, thus, adopted market opening provisions, such as section 251's mandate that incumbent local exchange carriers make available access to unbundled network elements, that promote market entry by competitors. 47 U.S.C. § 251(c).

[82] For instance, in *Total Tel. v. AT&T*, the Commission recently addressed a case in which a purportedly competitive access provider had tariffed rates that were in excess of $0.05 per minute. *Total Tel.*, FCC 01-84, File No. E-97-003.

[83] *Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338-49, ¶¶ 239-257; *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181; *Safe Harbor Public Notice*, 15 FCC Rcd 24102.

[84] *See, e.g.*, ALTS Comments at 35-36; RCN Comments at 12; AT&T Comments at 29-30; ALLTEL Comments at 7; USTA Comments at 24. *Accord* Sprint Comments at 25-27.

[85] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; CCG Comments at 6; USTA Comments at 24.

[86] *See, e.g.*, CCG Comments at 6; CTSI Comments at 16-18.

[87] Sprint Comments at 20. *See also* AT&T Safe Harbor Comments at 15 ("the Commission should mandatorily detariff all CLEC switched access rates that exceed the ILECs' rates in the same service area"). *Cf.* WorldCom Safe Harbor Comments at 3-5.

hand, citing their high start-up costs and greater per-minute cost of providing service, many CLECs have argued that they should be permitted to tariff rates at whatever level, in their view, is necessary to recover their costs.[88]

37. We decline to immediately move CLEC access rates to the rate of the competing ILEC.[89] CLECs have, in the past, set their rates without having to conform to the regulatory standards imposed on ILECs, and this Commission has twice ruled, in essence, that a CLEC's rate is not per se unreasonable merely because it exceeds the ILEC rate.[90] Accordingly, we are reluctant to flash-cut CLEC access rates to the level of the competing ILEC; a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models. On the other hand, we are equally reluctant to permit CLECs to continue to tariff the access rates they charge IXCs at the level they see fit, without any guidelines to ensure their reasonableness. We find persuasive IXC arguments that it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering.

38. In analyzing the problems surrounding CLEC access charges, it is important to recognize that, in their provision of access services, competitive carriers actually serve two distinct customer groups. The first is the IXCs, which purchase access service as an input for the long distance service that they provide to their end-user customers. As we discuss above, IXCs are subject to the monopoly power that CLECs wield over access to their end users. However, an equally important group of customers for access services is the end users who benefit from the ability, provided by access service, to place and receive long distance calls. In regulating ILEC access rates, this Commission has recognized the benefit that end users receive from access service and has concluded that it justifies the ILECs' imposition of the subscriber line charge (SLC) on end users.[91] The noteworthy aspect of this second group of access consumers, or beneficiaries, is that, unlike IXCs, they have competitive alternatives in the market in which they purchase CLEC access service: In any market where a CLEC operates, there is, by definition, at least one alternative provider – the ILEC.

39. The notion of these two, parallel markets for access service sheds light on the dilemma presented by CLEC access charges. It leads us to conclude that, in keeping with their competitive, unregulated character, CLECs should be permitted to set the combined level of their access charges, for all the consumers of the service, as they please. If, as they contend, their per-unit costs are higher than those of the ILECs, we will not stand in the way of their recovering those costs. Given the unique nature of the market in which the IXCs purchase CLEC access, however, we conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access

[88] *See, e.g.*, CCG Comments at 7-12; CoreComm Comments at 3-4; RCN Comments at 5 n.8.

[89] *See* Sprint Comments at 21 (advocating that we "set an absolute ceiling on what CLECs can charge IXCs"). *See also* WorldCom Safe Harbor Comments at 4-5; WorldCom Reply Comments at 20.

[90] *See Sprint Communications co. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000); *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

[91] *See, e.g., CALLS Order*, 15 FCC Rcd at 13000, ¶ 95.

customers – and, through them, the long distance market generally. On the other hand, we continue to abstain entirely from regulating the market in which end-user customers purchase access service. Accordingly, CLECs remain free to recover from their end users any greater costs that they incur in providing either originating or terminating access services. When a CLEC attempts to recover additional amounts from its own end user, that customer receives correct price signals and can decide whether he should find an alternative provider for access (and likely local exchange) service. This approach brings market discipline and accurate price signals to bear on the end user's choice of access providers.

40. Under the regime we adopt in this order, CLECs will be restricted only in the manner that they recover their costs from those access-service consumers that have no competitive alternative. We implement this restriction on the CLEC's exercise of their monopoly power by establishing a benchmark level at which CLEC access rates will be conclusively presumed to be just and reasonable and at (or below) which they may therefore be tariffed. Above the benchmark, CLECs will be mandatorily detariffed. CLECs that seek to charge to IXCs rates that are in excess of this benchmark may do so, but only outside of the regulated tariff process. A substantial number of commenters on both sides of the issue have suggested this safe harbor approach.[92] Given the historical disagreement among CLECs and IXCs on this issue, we find their joint support for this solution to be particularly persuasive. In addition to enjoying their support, the benchmark approach has several virtues that recommend it.

41. First, a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of "reasonableness." Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs.[93] This process has yielded presumptively

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[92] *See, e.g.*, WorldCom Safe Harbor Comments at 1-5; AT&T Safe Harbor Comments at 4-5; ALTS Safe Harbor Comments at 4-6; Minnesota CLEC Safe Harbor Comments at 2-6; CompTel Comments at 2-3; OPASTCO Safe Harbor Comments at 2. *But see* USTA Safe Harbor Comments at 4.

[93] First, an incumbent LEC must keep its books in accordance with Uniform System of Accounts set forth in Part 32 of the Commission rules. *See* 47 C.F.R. §§ 32.1 - 32.9000. Second, Part 64 of the Commission's rules divides an incumbent's costs between those associated with regulated telecommunications services and those associated with non-regulated activities. *See* 47 C.F.R. §§ 64.901 - 64.904. Third, our Part 36 separations rules determine the fraction of the incumbent LEC's regulated costs, expenses and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1 - 36.741. After the total amount of regulated, interstate cost is identified, the access charge and price cap rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs. *See* 47 C.F.R. §§ 69.1 - 69.731. These rules tell the incumbent LECs the precise manner in which they may assess interstate access charges on interexchange carriers and end users. Additionally, the Commission regulates the rate levels incumbents may charge for their access services, requiring them to comply with either the rate-of-return or the price-cap regulations. *Compare* 47 C.F.R. §§ 65.1 - 65.830 (relating to rate of return that certain non-price-cap ILECs may earn on interstate access service) *with CALLS Order*, 15 FCC Rcd at 12962, ¶¶ 151-84 (adopting rate (continued....)

just and reasonable access rates for ILECs. Recently, the Commission has attempted to move away from such extensive regulation of ILECs. With the *CALLS Order*, we solved some of the most vexing problems relating to ILEC access rates, reducing the subsidies implicit in access rates and establishing target rates to which the participating LECs will move over the five years following the order. Given our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers. We note that no CLEC has suggested that we adopt such a heavily regulatory approach to setting their access rates.[94]

42. Second, by permitting CLECs to file access tariffs at or below a benchmark rate, our interim approach continues to allow the carriers on both sides of the access transaction to enjoy the convenience of a tariffed service. As noted above, both IXCs and CLECs assert that their transaction costs would rise substantially if they were required to negotiate the terms on which they exchange access traffic.[95] Moreover, several commenters argue that the failure of some of these negotiations likely would lead to disruptions in the exchange of access traffic, which would, in turn, threaten the ubiquity of the public switched network.[96] We question whether the consequences of mandatory detariffing would be as drastic as some of the commenters contend.[97] Nevertheless, we recognize the attraction of a tariffed regime because it permits CLECs to file the terms on which they will provide service and to know that, absent some contrary, negotiated agreement, any IXC that receives access service is bound to pay the tariffed rates.[98] Similarly, IXCs will know that, whatever the source or destination of their access traffic, they will be assured a rate that either is within the benchmark zone of reasonableness or is one to which they have agreed in negotiations.

43. Third, adopting a benchmark for tariffed rates allows CLECs the flexibility to obtain additional revenues from alternative sources. They may obtain higher rates through negotiation. If a particular CLEC provides a superior quality of access service, or if it has a particularly desirable subscriber base, one or more IXCs may be willing to pay rates above the benchmark in order to receive that CLEC's switched access service. Similarly, CLECs retain the

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level components for price-cap carriers). Finally, Part 61 requires incumbent LECs to publish their rates in tariffs, and the rules restrict how and when incumbents may change their rates. *See* 47 C.F.R. §§ 61.1 - 61.193.

[94] *See, e.g.*, ALTS Reply Comments at 6 ("CLECs are unanimous in rejecting any need for further rate regulation of their industry"). *See also* Cox Safe Harbor Reply Comments at 6 (noting difficulty of applying traditional ILEC regulation to CLECs).

[95] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; ASCENT Detariffing Comments at 1-7.

[96] *See, e.g.*, Global Crossing Detariffing Comments at 7; Minnesota CLEC Detariffing Comments at 6; Time Warner Detariffing Comments at 7. *Cf.* Sprint Comments at 20.

[97] For example, we expect that stock contracts, broadly acceptable to both IXCs and CLECs, would quickly develop. Similarly, given all carriers' business incentives to maintain traffic flow, we question whether anything beyond minor customer inconvenience would develop. Moreover, the increased transaction costs of negotiation would likely be substantially offset by reduced regulatory and litigation costs associated with justifying tariffed rates.

[98] *See supra* note 71.

flexibility to charge their end users higher rates for the access service to which they subscribe. Here again, if the CLEC provides a superior product, the end user likely will be willing to pay for it; however, if a CLEC attempts to impose an unreasonable surcharge on its customer, the customer receives accurate price signals and may be motivated to find an alternative provider.

44. We conclude that the benchmark we adopt will address persistent concern over the reasonableness of CLEC access charges and will provide critical stability for both the long distance and exchange access markets. In structuring the benchmark mechanism, we have taken into account a broad variety of competing factors, including: (1) the need to constrain access rates with an eye toward continuing the downward trend in long distance prices, (2) the importance of having new entrants' rates move toward and ultimately meet those of market incumbents, (3) the need to avoid too severe of a disruption in the CLEC sector of the industry, and (4) the extreme difficulty of establishing a "reasonable" CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking. We conclude that our benchmark system, with its conclusive presumption of reasonableness, provides the best solution to the difficult problems associated with how CLECs set their access charges. We are optimistic that it will serve as a reasonable response, pending our more complete review of intercarrier compensation issues,[99] to the many competing pressures and priorities that surround CLEC access charges.

D. Level and Structure of the Tariff Benchmark

45. Our orders addressing ILEC access charges have consistently stated our preference to rely on market forces as a means of reducing access charges. Thus, in setting the level of our benchmark, we seek, to the extent possible, to mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider. We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area.[100] We do not, however, immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs. Our benchmark mechanism, with certain exceptions, will permit CLECs initially to tariff rates for their switched access service of up to 2.5 cents per minute, or the rate charged by the competing incumbent LEC, whichever is higher.[101] For those carriers competing with ILECs that have tariffed rates below the benchmark (generally, the Bell operating companies), the benchmark rate will decline over the course of three years until it reaches the competing ILEC's rate. For at least one additional year, CLECs will be permitted to continue to tariff this rate, even if we decide to move other access traffic to a bill-and-keep regime. We also adopt rules to ensure

[99] *See Intercarrier Compensation NPRM*, FCC 01-132.

[100] We refer to this rate as the "competing ILEC rate."

[101] Appendix B sets out the new rule 61.46 that we adopt to effectuate the benchmark for CLEC access rates.